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No. 99-815

IN THE

Supreme Court of the United States

JOSEPHINE CHIMBLO AND ESTATE OF
ANTHONY J. CHIMBLO, Deceased,
ROSALIE MONAHAN, Executrix,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF PETITIONERS

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STATEMENT

This litigation was brought under Internal Revenue Code (Code) § 6213 in defense against a notice of deficiency issued by IRS to Josephine Chimblo and her husband Anthony Chimblo, two elderly disabled persons beset by life-threatening illnesses. It is not litigation against any FPAA (final partnership administrative adjustment) and does *not* involve any partnership items or any partnership computational adjustment. The items in issue, as asserted by IRS in the deficiency notice, are strictly personal, non-partnership items, based entirely on

the personal circumstances of these taxpayers, and in no way involved any FPAA. The tax appeal here is entirely from that notice of deficiency pursuant to Code § 6213.

The emphasis placed by IRS on an FPAA is a misplaced distraction. In this litigation, not against an FPAA but against a deficiency notice, a defense that the deficiency notice was not issued within the limitations period, is authorized and proper under Code § 6213. The rulings below, denying the right to assert that defense in this litigation because of some TEFRA rationale, conflicts with established practice under § 6213.

The issues raised, as a result of denying these taxpayers the right to defend against the deficiency notice by asserting the bar of the limitations period, are stated and discussed in the petition herein. They are substantial issues concerning federal tax litigation and the TEFRA system, the application of the Internal Revenue Code, and the constitutional questions involved in the discriminatory treatment of these taxpayers. The IRS brief in opposition to the petition completely ignores these issues and says nothing about them. As to the presence of these issues or anything relating to them, there is no opposition in the IRS brief and no denial by IRS.

Instead, the IRS opposition is based entirely on a new matter, a claim that the deficiency notice was timely issued. Not only is there no support for that claim either in the Tax Court or Court of Appeals opinions but, completely to the contrary, an IRS suggestion to that effect was expressly rejected by the Court of Appeals. That claim is not proper here and is erroneous. That is the only opposition made by the IRS brief to grant of this petition with respect to the limitations issues, and, as shown below, that claim has no validity.

1. The IRS Insinuation That The Deficiency Notice Was Timely Issued Was Expressly Rejected By The Court of Appeals.

IRS was unable to produce any evidence that the deficiency notice was timely issued. IRS attempted to insinuate, by parenthetical suggestions at various times, that the deficiency notice was timely issued but it never showed that to be the fact. Denial of the limitations defense in this § 6213 appeal against the deficiency notice was based entirely on the claim that these taxpayers first had to become involved and raise it in the earlier partnership TEFRA case or else were precluded from raising it in the appeal against the later deficiency notice in this § 6213 proceeding.

Thus, the Court of Appeals stated below (*Chimblo v. Commissioner*, 177 F. 3d 119 at 125):

> "Aside from suggesting, without support in the record, that the tax matters partner probably granted an extension of the limitations period pursuant to IRC § 6229(b)(1)(B), the IRS does not refute the fact that the limitations period expired prior to its sending out the FPAA notices to Barrister and to petitioners. Instead, the IRS contends that petitioners may not raise a statute of limitations defense for the first time in their affected items proceedings, having failed to raise it at the earlier partnership level proceedings."

2. The Limitations Period For Issuing The Deficiency Notice Did Expire Before The Deficiency Notice Was Issued By IRS.

In point of fact, the limitations period had expired by the time IRS issued the deficiency notice here. There was good reason why IRS never made the contrary claim directly but sought to inject it by insinuation or suggestion. The limitations period had already expired under both

Code § 6229 and Code § 6501. The analysis to the contrary at p. 4-6 of the IRS opposition brief is defective.

Under Code § 6229(a), a general limitations period of three years is provided for making assessments against a partner both with respect to partnership items and so-called "affected" items of the partner. That three-year period starts with the date on which the partnership return is filed or, if later, the last day for filing the partnership return for the partnership year. There were no extensions of the period by agreement shown or involved in this case. Then Code § 6229(d) provides for suspension of that three-year period if an FPAA is issued to the partnership during the three-year period. Code § 6229(d) expressly refers to *suspension* of "the running of the [three-year] period" to allow for court review of the FPAA, until such court action becomes final and for one year thereafter.

Unless the FPAA is issued within the three-year period, it is obvious that the "running" of the three-year period cannot be suspended. That is the plain dictionary meaning of the statutory words. If the FPAA is issued after the three-year period has already *expired*, the three-year period is no longer "running" and there cannot be any *suspension*.

That is what happened here. The FPAA was issued after the applicable three-year period had already run and there could not be any *suspension*. The three-year period had already expired. The subsequently issued deficiency notice in this case was too late and was barred.

Thus, the tax years of Josephine and her husband involved in the notice of deficiency were the calendar years 1980 and 1981, to which deductible partnership items were caried back from the partnership calendar years 1983 and 1984. The partnership returns for those two

years were filed on April 15, 1984 and April 15, 1985, respectively. The three-year limitations period under Code § 6229(a) therefore ended, with respect to items relating to those two partnership years, on April 15, 1987 and April 15, 1988, respectively. However, the notices of deficiency in this case, as to both years, were not issued until May 3, 1996, long after those dates and long after the limitations period had expired.

IRS seeks to excuse that gap by relying on the Barrister partnership appeal to the Tax Court, and claiming that the limitations period was extended under Code § 6229 (d)(1) and (2) to May 18, 1996. But for that result to occur, to have a *suspension* of the "running" of the three-year period, it was necessary for the FPAA to have been issued, for the partnership years here involved, prior to April 15, 1987 and April 15, 1988, as shown above. The record establishes, however, that the FPAA for those partnership years was not issued prior to July 6, 1989, after both those 1987 and 1988 dates, and therefore there was no *suspension* of the limitations period to 1996.

That is exactly what the Court of Appeals said in the portion of its opinion quoted above at p. 3, that "IRS does not refute the fact that the limitations period expired prior to its sending out the FPAA notices to Barrister and to petitioners." 177 F. 3d at 125.

The same result follows, that the deficiency notice was issued after the limitations period expired, if Code § 6501 were applied.

The vice in the IRS explanation of the limitations period under Code § 6229 is its disregard of the requirement that an FPAA must be issued within the three-year period before the *suspension* of Code § 6229(d) can occur. The IRS interpretation destroys the limitations period because it would enable IRS to issue the FPAA at

any time, after any number of years beyond the three-year period, and then apply the waiting periods of § 6229(d) to bootstrap itself and make its action timely. That cannot be the result under § 6229.

3. IRS Statements In Its Opposition Brief Are Irresponsible And Inaccurate.

IRS statements in its opposition brief about the statute of limitations issue are often inaccurate and irresponsible. IRS seeks to create the impression that the lower courts found the deficiency notice to have been timely issued. That is not so, either as to the Tax Court or the Court of Appeals.

Thus, as one example, the IRS brief states at p. 6, that "the court of appeals correctly concluded (Pet. App. 11a-12a) that the notice of deficiency was timely for the affected items at issue in this case." That statement is false and a total misrepresentation. The Court of Appeals never concluded or in any fashion said that the deficiency notice was timely. The IRS position on this point is pure fiction.

4. The Court of Appeals Applied A Single-Fact Standard In Deciding Whether These Taxpayers Acted Reasonably.

In order to understand the narrow single-fact approach used by the Court of Appeals and the Tax Court in deciding that Josephine and her husband Anthony acted unreasonably in investing in the Barrister partnership, it is necessary to take into account their undisputed circumstances and where consideration of them is reflected in the opinions below.

Those circumstances are summarized at p. 14 and 15 of the petition herein. Attention is specially urged to the IRS concession that the investment in the Barrister part-

nership was *not* a tax-motivated transaction by Josephine and Anthony. Petition, Appendix E.

The Tax Court opinion clearly shows no consideration of any fact, in connection with the reasonableness of their decision to make that investment, other than the fact that they relied on the advice of a trusted, experienced certified public accountant who was found by the Tax Court not to be competent or to have the expertise to give such advice. Nothing else is mentioned in the Tax Court opinion. The Court of Appeals found no clear error and therefore affirmed. (App. 12a) The Court of Appeals subscribed to the single-fact approach of the Tax Court.

Furthermore, parenthetical questions raised by the Court of Appeals, and repeated by the IRS opposition brief at p. 8, show that it acted on a belief that Josephine and Anthony invested in the partnership for tax reasons. Those questions and their implication, such as the "too-good-to-be true" remarks, were entirely improper.

At the time Josephine and Anthony were advised by the accountant to make the investment, they were uneducated, inexperienced, disabled elderly persons; they both had heart conditions; and he was dying from colon cancer. He died within months after the investment was made, as shown in the record. They were in no condition to make complaints or to press inquiries.

More importantly, the implication of the Court of Appeals that they made the investment for tax reasons is directly contrary to the IRS concession that the investment was not a tax-motivated transaction. What the Court of Appeals has done is to disregard and override an important concession by one of the litigants, made in a written stipulation between the parties and at trial, and never retracted. That is a serious breach of procedure and a violation of the taxpayers' rights.

The circumstances of Josephine and Anthony fall squarely within this Court's express exclusion in its *Boyle* case, and within Justice Brennan's reservation in his concurring opinion in that case, as explained in the petition filed herein at pp. 15-16. The approach and decision of the Court of Appeals conflicts with other federal courts, in cases cited in the petition at pp. 16-17. These are matters which should be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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